

COPY

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION
SPRINGFIELD, ILLINOIS

ILLINOIS COMMERCE COMMISSION)

vs.)

NORFOLK SOUTHERN RAILWAY)
COMPANY)

No. T02-0076

TRANSPORTATION DIV

2002 SEP 11 A 10:02

ILLINOIS COMMERCE
COMMISSION

MOTION TO DISMISS

Comes now Norfolk Southern Railway Company by and through its counsel, Charles J. Swartwout and the attorneys of Gundlach, Lee, Eggmann, Boyle & Roessler, without waiving its objection to jurisdiction, moves to dismiss Illinois Commerce Commission's citation. In support of its motion, Norfolk Southern Railway Company states:

1. Norfolk Southern Railway Company (hereinafter "Norfolk Southern"), was mailed a citation which they received on August 12, 2002.

2. The citation does not state the legal authority upon which the citation is based or brought, and therefore the citation fails to comply with 5 ILCS 100/10-25(2) and to the extent applicable, the Illinois Code of Civil Procedure.

3. The citation does not state whether it is seeking civil, criminal or some type of equitable relief. Because Norfolk Southern is unaware of what the charge(s) against it or the relief sought are, it is impossible to determine whether the Illinois Commerce Commission has authority to seek that type of remedy and further, Norfolk Southern is not given notice of the burdens of proof required or proper notice of the allegations against Norfolk Southern.

4. An administrative agency is different from State Court because an agency only has the authorization given to it by legislature through statutes, consequently to the extent an agency acts

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outside its statutory authority, it acts without jurisdiction. *County of Knox, ex rel, Masterson v. The Highlands RSC*, 188 Ill.2d 546, 723 N.E.2d 256 (Ill. 1999). Because the citation fails to cite the legal authority upon which it is based or brought, jurisdiction is lacking.

5. The citation does not give Norfolk Southern any type of notice as to how it is in violation of regulation. The citation does not explain what quadrant or where at the crossing Norfolk Southern is in alleged violation, and therefore the citation fails to comply with 5 ILCS 100/10-25 and to the extent applicable, fails to comply with the Illinois Code of Civil Procedure.

6. The citation does not state when the alleged violation took place, and therefore the citation fails to comply with 5 ILCS 100/10-25 and to the extent applicable, fails to comply with the Illinois Code of Civil Procedure..

7. The citation does not state what comprises the show cause hearing, or what type of evidence Norfolk Southern will be allowed to put on or what type of evidence will be presented against it, or what type of penalties Norfolk Southern is susceptible to if the Illinois Commerce Commission finds against them, and therefore, the citation fails to comply with 5 ILCS 100/10-25 and to the extent applicable, the Illinois Code of Civil Procedure.

8. Forcing Norfolk Southern to submit to this show-cause hearing based on the citation violates Norfolk Southern's due process rights because the Illinois Commerce Commission is a biased decision maker. *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S. Ct. 1689 (U.S. 1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80 (1972); *United Church, ETC. v. Medical Center Commission*, 689 F.2d 693 (7th Cir. 1983).

9. The Illinois Commerce Commission has a pecuniary interest in the outcome of this decision in that they may be subject to suit, or they may be subject to losing public funds as a result of their prior investigation or study of this crossing pursuant to the written request of the Jefferson

County Highway Superintendent, and therefore, cannot provide the railroad with a fair tribunal. *United Church, ETC. v. Medical Center Commission*, 689 F.2d 693 (7th Cir. 1983).

10. The Commission also has an interest in protecting its institutional reputation. Every member of the Commission and every employee of the Commission has a vested interest in maintaining the public's and the legislature's trust in the Commission, and therefore, cannot provide Norfolk Southern with a fair, unbiased tribunal. *See Board of Education of Niles Township High School v. Regional Board of Trustees of Cook County*, 127 Ill. App.3d 210, 468 N.E.2d 1247 (1st Dist. 1984) (The interest need not only be pecuniary, it can be any interest which can be viewed as having a potentially debilitating effect on the impartiality of the decision maker, and if one member of an administrative body is not disinterested, his or her participation infects the action of the whole body and makes it voidable.).

11. The Commission also has prejudged the facts and the law in this case, as evidenced by the report, and by statements made to the press by employees of the Commission. *Comito v. Police Board of City of Chicago*, 317 Ill. App. 3d 677, 739 N.E.2d 942 (1st Dist. 2000).

12. Statute 92 IAC 1535.205 is unconstitutionally vague. The regulation does not inform a reasonably intelligent person as to what is required of them, and therefore violates the regulated party's constitutional rights. *Spinelli v. Emanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill.2d 389, 515 N.E.2d 1222 (Ill. 1987). The regulation does not define several key terms such as "right-of-way," "right-of-way adjacent to track," and/or "reasonably clear." The regulation states 500 feet, but does not state from where that measurement is made, does not define "materially obscure" or state how that determination is made, nor is it clear as to whose view "materially obscured" refers to. The regulation also is in conflict 625 ILCS 5/18c-7403 in that the regulation

requires the railroad to keep a distance of 500 feet "reasonably clear;" whereas the statute requires the railroad to have as much clearance as is "reasonably practical."

13. The Commission has enforced 92 IAC 1535.205 in an arbitrary and capricious manner, as evidenced by the fact that Illinois Commerce Commission has not enforced the regulation through citation, in the sixty five-year history of the Rule; and therefore, this selective enforcement of the statute is a violation of Norfolk Southern's due process rights.

14 The Commission cannot properly enforce 92 IAC 1535.205, because the phrase materially obscure is not limited to a specific date, time, event or circumstances and is therefore vague and is otherwise so abstract as to be unenforceable.

15. This hearing violates Norfolk Southern's constitutional right to a trial by jury as protected by the Illinois Constitution. S.H.A. Const. 1970, art. I § 13 and the Constitution of the United States of America.

WHEREFORE, Norfolk Southern Railway Company moves that the Illinois Commerce Commission's citation should be dismissed because the Commission does not have jurisdiction to enforce the regulation, the citation fails to comply with requirements of Illinois law, and because to proceed with the hearing would violate Norfolk Southern's constitutional rights.

GUNDLACH, LEE, EGGMANN, BOYLE & ROESSLER

By: 

Charles J. Swartwout

Andrew C. Corkery

Attorney for Norfolk Southern Railway Company

5000 West Main Street, Box 23560

Belleville, IL 62223-0560

PROOF OF SERVICE

The undersigned certifies that a copy of the attached document was hand-delivered on
September 10, 2002, to:

Kevin Sharpe
Director of Processing and Information
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701

Gary Schechter
Special Assistant Attorney General
Attorney for Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701



Charles J. Swartwout